

JULY 3, 1766.

A N S W E R S

F O R

ROBERT DEWAR Glasier in *Edinburgh*,

T O T H E

PETITION of *Patrick Miller* and Messieurs
Gibson and *Balfour*, Merchants in *Edinburgh*.

MOST of the Manufactories in *Scotland* are carried on in Copartneries, by Persons who have associated themselves into private Companies, and who, in all their Actings, are denominated by the Firm which they have assumed, and one of their Number is usually made choice of, to whom the general Management of the Copartnery Concerns, keeping their Books, &c. is intrusted.

Many of these Copartneries are set on foot without any written Articles, which, however useful in Questions amongst the Partners themselves, for regulating their respective Shares in the Copartnery, and other Matters of common Concern, are never made publick, and consequently not understood to be binding upon third Parties, who contract with the Manager or Institor, upon the Faith and Credit of the Company. The Lieges, in general, have no Access to know what these private Rules and Regulations are, and it would occasion infinite Embarrassment in conducting these Copartnery-concerns,

A

was



63

was every Person who contracts with such Manager or Institor, obliged to resort to, and demand Inspection of, the Articles of Copartnery, in order to know whether the Actings of the Institor were precisely agreeable to the Rules laid down by these private Articles.

That written Articles are not essential to the Constitution of such Copartneries, but that they may be established and proved *rebus & factis*, is a Proposition which can admit of no Dispute, so the Rule is laid down in *l. 4. pro socio.*---*Societatem coire et re et verbis, et per nuncium posse nos, dubium non est*, are the Words of that Law; and this founds the Distinction between the *societas expressa et tacita*; the first, *Quæ fit expressa conventionione*, the other, *Quæ re contracti dicitur, id est, rebus ipsis et factis.*---But as third Parties contracting with the Company have no Access to know whether there are any written Articles of Copartnery, or what the Particulars thereof are, where the same are not published, those who contract with the Institor, can only judge of his Powers from his ouvert Actings, as known to, and approved of, by the Company; and if, in these his Actings, he counteracts, or goes beyond the Powers which by the original Articles, whether written or verbal, were meant to be committed to him, the Company have themselves to blame; and it is more just, that they should suffer by the Fault of their Partner or Institor, than that third Parties, contracting with him upon the Faith of the Company, should sustain such Damage or Loss.

To illustrate this by one or two Examples, the Application of which to the Case in hand will be obvious and easy, let the Case be supposed, that, by the written Articles of Copartnery, appointing one of their Number to be their general Manager or Institor, and empowering him to use the Company Firm, it had been conditioned, that he should not take up Money from third Parties, upon Bond or Bill, above 100 *l.* But that, for any Sum within the 100 *l.* he should be at liberty to grant Bonds or Bills under the Company's Firm.

The

The Person so authorised acts warrantably in borrowing to the Extent of 100 *l.* and in granting Bonds and Bills under the Firm of the Company for that Sum ; but, upon a particular Occasion, finding the Affairs of the Company to require the immediate Advance of 150 *l.* he goes beyond his Limit, and takes up from different Hands the larger Sum of 150 *l.* and misapplies the Money in whole or in part ; each of these Lenders are within the Rule prescribed, and have no Access to know the Lendings by one another, but the whole, when joined together, exceeds the 100 *l.* beyond which the Institor was not allowed to go, it would surely be a hard Case, if that Limitation in the private Articles, kept by the Partners in their Pocket, was thus to be made a Handle of to the Prejudice of third Parties, contracting *bona fide* upon the Credit of the Company.

The Answer would be obvious and sufficient, that the Fault lay in the Copartners themselves, who had thus intrusted their *Socius* and Institor, to take up Money in name of the Company, upon Bonds and Bills, and were in the Knowledge of his granting such Securities, that this was sufficient to justify third Parties in contracting with him upon the Faith of the Company, and that as they had no Access to know the private Articles of Agreement, they could not be affected thereby.

Again, let it be supposed, that, in a Copartnery for buying of Grain, the Management of which had been committed to one of the Partners, as Institor appointed by the rest, it had been conditioned by the written Articles of Agreement, that he should not, at any one Time, buy above such a Quantity of this or the other Grain, lest, by so doing, he should overcharge their Granaries ; the Partner, so authorised, makes different Bargains with different Persons, at one and the same Time, whereby, upon the whole, he goes beyond his Boundary, though the Quantity bought of each Individual is within the same ; the Respondent submits it to
your

your Lordships, whether, in such Case, these private Articles, kept in the Partners Pocket, could be obtruded to those who had contracted with the Institor upon the Faith of the Company?

Numberless other Instances of the same Tendency might be figured, to evince the Injustice and Absurdity of such a Doctrine;—and it is no good Answer to say, that at this rate there would be no Safety in such Copartnery Undertakings, if the Articles upon which their Copartnery was established, were not to be observed; the Answer is obvious, that it is the Business of the Partners not to commit such Powers to any one of their Number, which may be so abused; and it is more just that they should suffer by the Fault of their Partner, to whom they have committed such Powers, than that third Parties, who contract with him upon the Faith of the Company, should be ensnared.

It may also be assumed as an undoubted Fact, that whatever Circumspection is used in the original Establishment of these Copartneries, by circumscribing them within certain Limits, there is not one of a hundred where these are not departed from; whereby the Copartnery, which did not require any written Articles to its Establishment, comes to be varied, *rebus et factis*, arising from numberless unforeseen Incidents, and of which a stronger Example cannot well be conceived, than what occurs in the present Case.

Such was the Nature of the Copartnery entered into by the Petitioners and *John Weir*, Merchant in *Edinburgh*, conform to private Articles of Agreement, dated the 1st July 1763.

These Articles proceed upon a Declaration of the mutual Trust and Confidence they reposed in each other, whereupon they had resolved to enter into a Copartnery for carrying on a Linen-trade for the Space of five Years, under the Management of *John Weir*; and therefore, by the first Article, it is agreed, that the said Trade and Business is to be carried on
and

and managed by the said *John Weir*, in the Name and by the Firm, *John Weir and Company*.

By Article 2d, the capital Stock of said Company is agreed to be 2400*l.* to be contributed by the Proportions therein stated, whereof *John Weir* was to contribute 1200*l.* so that, besides his having the general Management of the whole Copartnery-concerns, he was to have an Interest therein equal to that of all the other Partners, and was to suffer Loss proportionally.

By Article 4th, it is conditioned, that whatever further Sums shall from time to time be wanted, for carrying on said Trade, the Partners should advance the same, according to their respective Proportions of the capital Stock.

The 6th Article provides, that, during the Continuance of said Copartnery, *John Weir* shall not be concerned in any other Business with any Person whatever, and "*that he shall not, without the Consent of one of the Partners, make any Sales or Purchases above the Value of 100*l.* Sterling.*"

The 9th Article concludes in these Words: "And the said *John Weir* shall not borrow any Money for the Company's Account, or under their Firm, without the previous Consent of all the Partners, under the Penalty of Half the Money so borrowed."

And, by the 11th Article it is agreed, that whatever other Rules and Regulations, or Alterations of the Articles before mentioned, shall, by the said Partners, be judged useful and necessary, for the better carrying on and managing the Affairs of the said Company, and shall be insert in their Journal and signed by them, or which shall be agreed to by any other Writing under their Hands, the same shall be equally binding as if therein ingrossed.

Whether any, or what Additions or Alterations were made upon these original Articles, by any private Writings, the Respondent cannot presume to say; but, as from the Company's Books of Accounts it appears, that they came to have

a Concern in other Branches of Trade, which had no immediate Connexion with the Linen-manufactory; these other Matters, particularly their dealing in Stockings, &c. their bringing home from the Plantations, large Parcels of Plantation-goods, such as Rum, &c. these must either have been left without any Rule, to be managed at the Discretion of the Infitor, or other private Articles of Agreement must have been established, which last the Petitioners do not pretend to say was the Case.

In *December* 1764, the Respondent had thrown into his Hands 160 *l. Sterling*, no inconsiderable Part of his small Stock, of which *John Weir* having received Intelligence, and pretending, as he said, to have Occasion for that Sum for the Use of the Company, it was the Respondent's Misfortune to impress that Money into his Hands, upon a Bill payable in six Months, granted in the usual Stile of the like Bills, which he was in daily use to grant, and which circulated currently in this Town, under their known Firm of *John Weir* and Company.

Upon *John Weir's* unexpected Insolvency, the Respondent made his Demand for Payment of the Contents of this Bill, upon the Petitioners, the other Partners—which they were then so far from disputing, that it is Fact, and which it is presumed they will not deny, that they not only told him it should be paid, when due, but did actually lodge the Money with their Clerk, with Orders to pay it, but which they afterwards recalled, upon being advised, that as the Articles of Copartnery did not authorise *Weir* to borrow Money under the Company's Firm, without the previous Consent of the other Partners, they were not bound to acknowledge this Bill as a Company's Debt.

They could not well imagine, that the Respondent would agree to this, and therefore they took the start, and without waiting a Charge, applied for and obtained Suspension; which coming to be discussed before the Lord *Kaims*, it was
the

the Respondent's Misfortune to have his Lordship's Interlocutor against him. But when the Question was brought under your Lordships Review, by a Reclaiming Petition and Answers, you were pleased to be of a contrary Opinion, and by Interlocutor 14th *June* last, " you repelled the Reasons of " Suspension, found the Letters orderly proceeded, and decerned."

The Suspenders reclaim; and, though they do not pretend to have any thing new to offer, either in Point of Fact or Argument, they pray your Lordships to alter your former Interlocutor, and to suspend the Letters *simpliciter*.

The Petition is introduced with a false Alarm, as if the Trade of the Nation was in danger by this Judgment, as there could be no Security in these Copartnery Undertakings, which had no Relation to the borrowing or lending of Money, if any one of the Partners, using the Firm of the Company, could take up what Sums he pleased, and by granting Security therefor, in Name of the Company, subject the other Partners to the Payment of the Sum so borrowed; and this more especially in the present Case, where, by the original Articles of Copartnery, it had been expressly conditioned, that *Weir*, the managing Partner, shall not borrow any Money for the Company's Account, or under their Firm, without the previous Consent of all the Partners, under the Penalty of Half the Money so borrowed.

The Argument upon the general Point is thought to be fully obviated by the Principles laid down in the former Part of these Answers. The Observations thereupon made, and the Examples with which they are enforced, the Result of all which is, That however effectual private Articles of Agreement may be for determining Questions amongst the Partners themselves, third Parties who contract with them, or, as in this Case, with the Institor, as they have no Access to know, so they cannot be bound by these private Articles.

And

And your Lordships will consider, what an Embarrassment it would occasion in every Branch of Trade, carried on by Companies under one common Firm, if every Person having Occasion to contract with them, or their Insitor, was previously bound, not only to take Inspection of the written Articles, if such existed, and of all other private Writings, Entries in Journals, &c. whereby any Alteration had been made upon their original Articles, in order to know, whether the Manager or Insitor was acting within or without his Powers; the Examples already given prove how impracticable this would be, and, consequently, that however such private Articles may be binding among the Partners themselves, they were neither understood, nor intended to be effectual upon third Parties, contracting upon the Faith of the Company, as, upon that Supposition, they must have been published in some Manner or other, to put the Lieges upon their guard.

And to illustrate this by another Example taken from these very Articles: *John Weir*, is thereby restrained from making Sales or Purchases above the Value of 100 *l.* Whether by this was intended, that he should not sell Goods, above that Value, to any one Person, or purchase Goods above that Sum from one Person, or that his whole Sales and Purchases, so made, from different Persons; should not exceed the 100 *l.* is not easy to determine; but supposing, for Argument's Sake, and which is the most probable, the Meaning to be, that his whole Sales or Purchases made at one Time, though from different Persons, should not exceed that Sum, how were the Lieges to know this Restriction? and supposing they had known it, how could they have dealt with him with any Kind of Security? the Sale to, or Purchase from every Individual, was within the Sum allowed, but when the whole are thrown into one Sum, they exceed the same.

It

It may have been wrong in the Manager to commit that Excess, the Fault lay in the Partners, in their allowing him the Liberty to buy and sell in the Name, and under the Firm of the Company, without ever publishing this Restriction, or taking some other effectual Measure to prevent his exceeding his Powers.

The Matter now in dispute depends upon the very same Principles, *Weir* was authoris'd to use the Firm of the Company, and, in consequence thereof, the great Number of Bills which he granted, and which had a current Circulation through this Town, pass'd from Hand to Hand, without any Doubt or Suspicion of their being binding upon the Company.

That he was in the Practice of granting such Bills, and that the same were acknowledged by the Company, and paid by them, and that these Bills circulated freely, and had a Currency as the Bills of any other Company, or private Parties, are so many known Truths, as appear from the Condescendence, or Excerpts from the Company's Books, and of which many more Examples could have been produced, had that been thought necessary.

The Petitioners are pleas'd to say, that these Bills were granted to Manufacturers, for the Price of Goods purchased by them, for carrying on the Copartnery Business, and that the Company's allowing *Weir* to grant such Bills, can be no Authority for his taking up Sums of Money upon Loan, and granting Securities therefor.

But it is submitted to your Lordships, that this Answer is in no Degree sufficient, that most of these Bills may have been granted to Manufacturers, may possibly be true, but there are others of them which do not seem to come under that Distinction. In the Condescendence exhibited by the Suspenders, they were pleas'd to add the Designation of most of the Drawers of these Bills, stiling them Manufacturers, though not one of them bears the Designation of the Drawer,

C

but

but the Designations of several of them are omitted in the Condescendence, probably because they are not Manufacturers; the Respondent knows this to be the Case of one Bill, drawn by *Johnston and Smith of Edinburgh*, Bankers.

This of itself is sufficient to demonstrate, that *Weir's* Power of granting Bills in name of the Company, was not limited to Purchases made from Manufacturers.

But supposing that such Limitation had been intended, as the Petitioners were in the Knowledge, that these Bills, which had a free Circulation, passed from Hand to Hand by Indorsations, and were mostly taken up on Discount by the Bank, or by the British-linen Company, and were ultimately paid by them, were not granted to the Creditors of these Bills, *qua* Manufacturers, but *tanquam quilibet*, and very few of them bearing to be for Value in Goods, or any other Mark, whereby one could be led to suppose they were granted for Goods, but either bearing Value in general, or to account, so that the Purchasers of these Bills, could not possibly know for what Values, or to Persons of what Character, they were granted; and as the Petitioners, when in the Knowledge of *Weir's* being in the daily Practice of granting such Bills, and of their passing from Hand to Hand by Indorsation, did clearly approve of his Practice in so doing, and thereby constitute the Lieges *in bona fide* to purchase their Bills, they are barred *personali exceptione*, from objecting to any Bill, which he granted in name of, and under Firm of, the Company.

If the Respondent had indorsed his Bill to any other Person for Value, and which might have passed by Indorsation through twenty different Hands, it would have been a hard Case, if the Holder of this Bill, in order to intitle him to recover the Payment from the Company, had been obliged to enter into an Expiscation and Proof, what the true Cause of granting that Bill was, when there were so many

ny daily Instances of such Bills being granted, and acknowledged by the Company.

And as this would have been no good Defence against any third Person purchasing these Bills in a fair Way of Commerce, it does not occur, how it should operate against the Respondent, unless it can be maintained, that he ought to have known the private Articles, and that *John Weir* was thereby restrained from borrowing any Sum on the Company's Account, for that this Money was furnished upon the Credit of the Company, is proved as much as any Thing of the Kind can be, by its being granted under the known established Firm of the Company.

The Petitioners are at a loss to conceive, how a Person of the Respondent's Rank and Credit in *Edinburgh*, should have been so well acquainted with *John Weir's* being in use to grant Bills under the Firm of *Weir* and Company, and upon Supposition of his not having Access to know this Fact, the Inference they draw from it is, that the Respondent must have lent the Money upon the personal Credit of *Weir*.

It is believed your Lordships will not think this a Circumstance worthy of investigating; the Respondent's Trade, as a Glazier, could be no Bar to his being informed of a Fact, which was notorious to every Person that had ever heard of this Company, and whose Bills were constantly in the Circle.

The Respondent himself was no Judge, whether the Security offered for the Loan of this Money, which he understood was to be repaid at the End of six Months, was such a Security as he ought to rest satisfied with; but he avers it to be Fact, that those he advised with, when the Loan of this Money was proposed, gave it as their Opinion, that the Security was unquestionable, that the whole Copartnery would be bound for it, telling him, that they had seen Numbers of the Bills above mentioned, circulated in *Edinburgh*.

Thus

Thus far the Argument has proceeded upon Supposition, that it had been the Meaning and Understanding of the Partners, by the aforesaid Articles, that *Weir* was not to be at liberty, upon any account whatever, to borrow any Sum upon the Credit of the Company, and that if he should do in the contrary, those from whom he took the Money were to have no Claim against the Company on that account. The Petitioners are indeed pleased to admit, that whatever *Weir* did, in the ordinary Course of Administration of the Affairs of this Copartnery, the Company would be bound to make good the same ; but as the declared Purpose of the Copartnery was to carry on the Linen-trade upon a limited Capital, and as the borrowing of Money was no ordinary Act of Administration, they insist, that tho' there had been no Proviso to the contrary, *Weir* would not have been intitled to grant Bills for borrowed Money that should be binding on the Company, though they do not dispute that such Bills might have been granted for the Price of Goods furnished to the Company, and that this must obtain with double Force, when, by the Articles of Agreement, he was so expressly restrained from borrowing Money.

The Respondent has shown, in the former Part of these Answers, that this was not the Company's own Sense and Understanding of the Matter ; for that the Bills which *Weir* was in use to grant, were granted promiscuously, as occasion offered, some for Value, without specifying what their Value was, some, and these but very few, for Value in Goods, others for Value in Account : That the Bills, so granted, were currently circulated, and taken up both by the Bank and *British* Linen Company, as holding them to be good Company Bills, without enquiring what Value was paid for them : That some of them were granted to Persons who were no Manufacturers ; and that the Petitioners never pretended to find Fault with their being granted in that Form.

But

But the Respondent can by no means agree, that the Clause referred to, can, by any fair Construction, admit of such Meaning; for, if it had been understood, either upon the general Principles of Law, or, from the written Articles of Agreement, that *Weir* had no Power, by taking Money upon Loan, and granting Bills therefor, to bind the Company, to what Purpose should an express Prohibition have been thought necessary? As the Clause is worded, it would seem to import the direct contrary, *viz.* that from the Apprehension they had, that *Weir*, by borrowing Money, and granting Bills in name of the Company, might effectually bind the Company, they resolved to secure themselves against any Danger from that Quarter.

To guard against this Evil, the Certification annexed was not a Voidance of the Securities, or any Proviso that the same should not be effectual against the Company, but a Penalty upon *Weir*, *viz.* a Forfeiture of Half of the Money so borrowed, without the previous Consent of all the Partners, manifestly supposing, that the Company were to be bound to make good the Sums they had borrowed upon their Credit, as there could be no just Cause for subjecting him to so high a Penalty, where the Company could suffer no Damage by his Borrowings upon their Credit, and under their Firm, if they were not bound to make good the same.

And what serves to put this Matter beyond all Doubt, is, that the Agreement concludes with a general Penalty respecting the whole preceeding Articles, whereby they are severally bound to perform the Premises, *hinc inde*, under the Penalty of 100 *l. Sterling*. So that, by the same Argument, it might be said, that every tortious Act done by one or other of the Partners, contrary to one or other of the aforesaid Articles, should have the Effect to exeem the Company from being bound to third Parties, by the Acts and Deeds of the several Partners, in so far as these were contrary to their private Articles of Agreement, though, for every such Breach,

the Penalty established by the Contract itself was the Forfeiture of 100 l.

That this was not the Petitioners Sense and Understanding of the Matter, will appear from this other Consideration, *viz.* that *Patrick Miller* furnished a Cash-account to the Company, whereby *Weir* was enabled, as Occasion required, to take up from him whatever Sums he had use for; and as, by these Advances, *Miller* became a private Creditor of the Company's, the Respondent would ask the Question, whether these Advances, upon the Credit of this Cash-account, were not so many Loans to the Company, and whether, supposing *Weir* had misapplied any Part of the Money taken up upon the Company's Credit, Mr. *Miller* would not have thought himself justly intitled to have claimed Payment thereof from the Company? And if it shall be admitted, that the Company were bound to make good these Advances by *Miller*, it does not occur what Difference they should make, whether these Sums were taken up from *Miller* or any third Person, if the Advances were truly made upon the Faith and Credit of the Company.

And this leads the Respondent, in the *last place*, to observe, independent of all the above Arguments, that, from the *res gesta* it appears, that this Sum was truly applied for the Company's Use: An Account was opened between the Company and Mr. *Miller*, as a Fund of Credit to the Company, to be used by *Weir* as Occasion should require, without any express Authority from the other Partners for that Purpose: Upon this Credit, *Weir*, the Institor, got Money from Mr. *Miller*, for the Use of the Company, and paid it back as the Funds of the Company came into his Hands.

In this Operation, Mr. *Miller* acted as a private Creditor to the Company, not as a Partner. On the 4th *December* 1764, *Miller* was in Advance to the Company: *Weir*, at that precise Period, borrowed 160 l. from the Respondent, and the very next Day, *Weir* pays over that precise Sum to *Miller*,
which,

which, of course, diminished so much of the Debt the Company owed to him. The Identity of the Sums, and the immediate Application of it to the Payment of *Miller*, is Demonstration that it was the Respondent's Money that was thus applied; and, if your Lordships are satisfied, that such truly was the Case, it is humbly submitted, with what Justice the Company can take Advantage of this Borrowing to diminish their Debt to *Miller*, at the Respondent's Expence.

This would be plainly catching a most undue Advantage. Supposing the Company had been Debtors by Bond in 100*l.* and that *Weir* had borrowed from any other Hand the like Sum, and applied it in Payment of the Company's Bond, no Prejudice would thereby be done to the Company, when bound to make good the Sum that had been borrowed to pay their former Debt, because, in so far it was *in rem versam* for the Company; so that upon the whole Principles, unless he can satisfy your Lordships, that the 160*l.* paid to *Miller* on the 5th *December*, was not the 160*l.* advanced by the Respondent to *Weir*, the Evening of the preceeding Day, but arose from the Company's proper Funds, every Principle of Law, Justice, and good Conscience, obliges them to make good this Sum to the Respondent.

In respect of all which, it is hoped your Lordships will have no Difficulty in adhering to your former Interlocutor, and refusing the Desire of this Petition.

ALEX. LOCKHART.



